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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1123

STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

v.

UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

NORMAN B. FROST,
FRANK N. MYERS,
FREDERIC N. TOWERS,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

Petitioner seeks to have reviewed by this Honorable Court a decision of the Court of Claims of the United States, rendered January 8, 1945, involving questions arising out of a government construction contract.

Points Involved

1. WHETHER, UNDER A CONTRACT FOR CONSTRUCTING BUILDINGS, THE UNITED STATES IS ANSWERABLE IN DAMAGES TO THE PRIME CONTRACTOR FOR EXTENSIVE DELAY DUE TO ABANDONMENT BY A SECOND GOVERNMENT CONTRACTOR OF ITS CONTRACT FOR INSTALLATION OF HEATING, PLUMBING, ELECTRICAL AND OTHER MECHANICAL FIXTURES.

2. WHERE THERE WAS AN ADMITTED DELAY TO THE PRIME CONTRACTOR OF 352 DAYS DUE TO SLOWNESS AND INEFFICIENCY OF THE MECHANICAL TRADES, PART OF WHICH DELAY OCCURRED WHEN THE GOVERNMENT'S MECHANICAL CONTRACTOR WAS ON THE JOB AND PART AFTER THE GOVERNMENT ITSELF TOOK OVER THE MECHANICAL WORK, WHETHER IT WAS NECESSARY FOR PLAINTIFF TO SEPARATE ITS PROOF TO SHOW ONLY THE AMOUNT OF DAMAGE SUFFERED AFTER THE GOVERNMENT TOOK OVER.

3. WHETHER THE GOVERNMENT IS LIABLE FOR ADDITIONAL WORK, IN THE ABSENCE OF A WRITTEN CHANGE ORDER, WHERE SUCH WORK ALTHOUGH NOT PART OF THE ORIGINAL CONTRACT WAS ESSENTIAL FOR COMPLETION OF THE PROJECT, WAS NECESSITATED BY FAILURE OF THE GOVERNMENT TO FURNISH PROPER PLANS, AND WHERE THE COST COULD NOT BE ESTABLISHED IN ADVANCE OF DOING THE WORK.

Opinions Below

The opinions of the Court of Claims in the instant case, Cause No. 43,808, and in the related case of *Holpuch* v. *United States*, Cause No. 43, 813, both handed down January 8, 1945, for convenience are printed in an Appendix hereto.

Short Statement of the Facts

This case arises out of a construction project for Veterans' Bureau hospital buildings and nurses' home at Leavenworth, Kansas. Originally, a contract for the project was let to Joseph A. Holpuch Company, but that contract was terminated by the Veterans' Bureau for lack of progress.

Although termination of the original contract was reported to the Court of Claims by its Commissioner to have been "arbitrary, capricious and unreasonable" the Court itself made no finding on that point. (Appendix, Opinion in No. 43,813, finding "6")

Following the order of termination of the Holpuch contract, conferences were held in the Veterans' Bureau at Washington, D. C., attended by the original contractor, the surety on the original contractor's bond (petitioner hereunder) and various officials, including the head of the Bureau. At these conferences, the Holpuch Company submitted data to prove that it would have no difficulty in finishing the job. The Holpuch Company's request for reinstatement was denied and an oral agreement entered into with petitioner, whereby it agreed to take over and complete the job within the terms of the original contract.

Delay and Obstruction by the Government and Its Mechanical Contractor. Work on the construction project in question had been divided by the government into two contracts, the one originally let to Holpuch covering the general construction, and a second contract between the United States and P. H. Meyer Company, of Louisville, Kentucky, in the sum of $183,900, covering the so-called mechanical trades, that is, installation of plumbing, electrical, ventilating, steamfitting and heating equipment. The plumbing and steamfitting work covered by the Meyer contract included all fixtures, bathrooms, toilets, etc., numerous in a building of this sort, as well as the risers, pipes, water pipes, soil pipes and vents. Neither the original contractor, Holpuch Company, nor petitioner had any contractual relationship or obligation respecting the installation and completion of the mechanical trades work covered by the P. H. Meyer Company contract.

From the start until the end of the job, the work of the mechanical trades was in such a state of confusion and delay as to cause disorganization of the general contractor's work.

About midway the job, the Meyer Company's contract was suspended by the United States, it quit the job, and all work

on the project was stopped. The surety on the Meyer Company's bond failed at about the same time, and after a 53 day total suspension of work, the government itself undertook to complete the mechanical trades work by day labor. Progress after the government took over the mechanical work was slow and unsatisfactory and impeded petitioner's progress very substantially. The completed project was accepted by the government 333 days behind schedule. The acting head of the Veterans' Bureau in a formal administrative ruling found petitioner to have been delayed a total of 352 days by failure of the mechanical contractor and the government to perform the mechanical work orderly and on time. In the administrative ruling no segregation was made as to how many days delay were due to the mechanical contractor and how many to the workmen directly employed by the government after Meyer Company quit the job. The Court of Claims, in the above situation, held that:

> "It is admitted the Meyer Company did delay plaintiff, but plaintiff cannot recover from this defendant therefor. *It is clearly not entitled to recover from the defendant damages for delays caused by an independent contractor.* It was not the defendant that caused these delays; they were caused by a third party." (Italics supplied.)
>
> "But the findings of fact of the Director of Construction, show that after the defendant took over this work from the P. H. Meyer Company there was still some delay on the job. For such delay plaintiff is entitled to recover; but the proof does not show the amount of the delay nor the damages caused thereby. Plaintiff undertook to show its damage for the entire delay caused by the doing of the plumbing, electric, etc., work, both the delay caused by Meyer Company and the delay caused by the defendant, but it does not separate the two. For failure of proof, no recovery can be allowed on this item."

Altogether, the damages proven by petitioner as a result of these delays amounted to $54,840.27.

Extra work—Additional lathing and plastering on account of changes in location of pipes and risers. The location of vertical plumbing, steam and water pipes, stacks and risers, were shown on the architectural drawings, which were the contractor's guide in preparing its bid, and in detail on the mechanical drawings. Due to discrepancies between the architectural and mechanical drawings (of which there were about 500) many changes had to be made in the location of these pipes and risers after the job started. For example, in many instances the mechanical contractor was ordered to vary the location as shown on the plans of steam risers and vertical pipes which otherwise would have run vertically through the reinforced concrete beams at various floor levels. Where pipes had to be furred or enclosed, the fact that in many instances they were moved out from the wall a greater distance than originally shown on the drawings increased the cost of the lathing and plastering, as the false wall had to be built up out of channel iron and metal lath, and plastered.

In the construction of buildings sometimes these vertical pipes are exposed and sometimes they are enclosed. In the architectural plans on this job all pipes in the Nurses' Home were shown as concealed but with respect to the other buildings the plans did not show any concealment or furring for the vertical pipes, risers, etc. The contractor hence did not estimate on any furring except as shown on the drawings, namely, in the Nurses' Home, covering an area of approximately 22,000 square feet. Despite petitioner's protests the government superintendent in charge ordered approximately 75,000 square feet of furring and plastering done around these pipes and risers, advising petitioner that it

would have to go ahead and do the extra furring and plastering as directed and file a claim for anything deemed not within the contract. A claim covering the extra furring and plastering was filed about one month after the job was completed. The necessity of doing this additional work was not contemplated and could not have been foreseen by the original contractor or petitioner.

The cost of this extra furring, lathing and plastering was $13,403.97.

The Court below barred this item of claim on the ground that it was extra work which, under Article V of the contract, should have been covered by a written change order.

However, these changes were of such a necessary and fundamental nature that they were essential to production of completed structures, and their cost could not have been determined in advance due to the fact that the government superintendent of construction had to locate the pipes and risers as the job progressed because of failure of the government to furnish proper plans.

Due to failure of the government to furnish heat pursuant to its contract obligation, and because of the delay occasioned by failure of the government mechanical contractor (and after its abandonment of its contract, failure of the government's own workmen), the contract plastering and furring cost $13,809.73 more in wages than it would otherwise have cost. Plaintiff did not (and could not) segregate its proof by showing how much of the extra cost was attributable to failure of the government to furnish heat, how much to delay by the government's mechanical contractor and how much by the government's own workmen. *Presumably*, because of that lack of segregation of proof, the item was disallowed. The word "presumably" is used because while the Court below did allow a small item of claim for repairing cracks in plaster, due to the same failure

of the government to furnish heat (on the ground that failure to furnish heat constituted a breach of contract), this item of claim of $13,809.73 for additional labor due to delay occasioned by the failure of heat *and* to the general delay caused by the mechanical trades, was nowhere specifically referred to in the opinion below.

Several other items of extra work claimed below are abandoned insofar as this petition and any further proceedings are concerned because of the smallness of the amounts involved or of existence of controversy regarding the facts.

WHEREFORE, believing that the Court of Claims of the United States was in error in refusing, by its decision, to allow items of claim referred to herein, petitioner prays that a Writ of Certiorari be issued out of this Honorable Court to review the judgment of the Court of Claims of the United States entered on January 8, 1945, in Cause No. 43,808, entitled Standard Accident Insurance Company v. United States.

NORMAN B. FROST,
FRANK N. MYERS,
FREDERIC N. TOWERS,
Counsel for Petitioner.

Jurisdiction

Jurisdiction to issue the Writ prayed for is conferred upon this Honorable Court by Section 3 (b) of the Act of February 13, 1925, as amended.

Principal Ground Relied Upon by Petitioner

The principal ground relied upon by Petitioner for allowance of the Writ can be summarized as follows:

The Court of Claims of the United States, in the face of an admission to the contrary in the government's brief, in the absence of oral argument on the point, and without citation in its opinion of any authority or statement of supporting reason or logic, has boldly announced a rule of contract law* contrary to that contained in the text books and in all reported decisions, and, especially, contrary to an unbroken record of decision in the Court of Claims.

Should the Court of Claims have been right in changing the law, the pronouncement should be given sanction by an opinion from this Honorable Court: should the Court below have been in error, the substantial injustice done petitioner should be remedied.

Contract Provisions Involved

The following provisions of the contract, which was upon a standard government form, may be pertinent.

"Article 3. *Changes.* The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due

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* That a contractor "is clearly not entitled to recover from the defendant (owner) damages for delays caused by an (the owner's) independent contractor".

under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

"Article 5. *Extras.* Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order."

ARGUMENT

The Court below was in error in holding that defendant was not liable in damages for delays due to slowness and disorganization of its mechanical contractor.

The Department of Justice, in its brief in the Court of Claims, had only the following to say regarding plaintiff's claim for damages due to delay:

> "Plaintiff's brief confines its arguments on the law to the proposition that where the Government breaches a contract by delaying a contractor, the contractor may recover for all loss or damages sustained thereby. We cannot take issue with such a well-established proposition, but the question in the case is not only whether there was a contract, but whether the contractor sustained any loss or damage."

Government counsel did not refer to the point at all in his oral argument.

The factual situation as shown by the findings was that plaintiff had been delayed 352 days by the mechanical trades. Its original mechanical contractor having abandoned the job, after disorganization and delay, the government took direct charge of the mechanical work. The delay of 352 days to plaintiff had occurred partly before the abandonment by the government's mechanical contractor and partly after the government itself took over. There was and is no dispute about the extent of the delay or the fact that both the government and its mechanical contractor shared the responsibility. The Department of Justice having admitted plaintiff's position in its brief, the Court of Claims out of a clear sky dismissed the delay claims with the mere statement:

> "Plaintiff's last claim is for damages for delays caused by failure to do promptly the plumbing, heating, electrical work, etc. The P. H. Meyer Company, of Louisville, had an independent contract with defendant for the doing of this work, but its right to proceed under its contract was cancelled on March 31, 1933, and thereafter this work was performed by the defendant itself.
>
> "It is admitted the Meyer Company did delay plaintiff, but plaintiff cannot recover from this defendant therefor. *It is clearly not entitled to recover from the defendant damages for delays caused by an independent contractor, and not involving any fault on the part of the defendant.* * * * (Italics supplied)
>
> "But the findings of fact of the Director of Construction of the Veterans' Administration, approved by the Assistant Administrator of the Veterans Administration, show that after the defendant took over this work * * * there was still some delay on the job. For such delay plaintiff is entitled to recover; but the proof does not show the amount of the delay nor the damages

> caused thereby. Plaintiff undertook to show its damages for the entire delay caused by the doing of the plumbing, electrical, etc., work, both the delay caused by Meyer Company and the delay caused by the defendant, but it does not separate the two. For failure of proof, no recovery can be allowed on this item."

Although every decision of the United States Court of Claims since its inception was to the contrary, and in the face of contrary text book law and decisions in the other Federal and State courts, the Court below did not make any statement of reason or logic for changing the rule.

The most commonly used book of quick reference, Corpus Juris, contains the following statement:

> "The owner is liable in damages to the builder, for a delay in performance on his part, or caused by some act of his or of his representative. * * * The owner is also, in the absence of any stipulation in the contract exempting him therefrom, liable for damages from delays caused by the failure of other contractors to perform work which they have undertaken to do for the owner, and which, as regards the contractor, the owner is under obligation to do." 9 C. J. p. 790.

The gist of the above statement is carried over in Corpus Juris Secundum, Vol. 17, p. 1060. The following authorities, among other, are cited in the footnote:

Nelson v. *Pickwick Associated Co.*, 30 Ill. A. 333;
Norcross v. *Wills*, 198 N. Y. 336; 91 N. E. 803;
State v. *Farish*, 23 Miss. 483;
See v. *Patridge*, 9 N. Y. Supp. 463.

In the *Nelson* v. *Pickwick Associated Co.* case, *supra*, it was held that a building construction contract, such as the one here involved, implies an obligation on the part of the owner to keep the building in such a state of forwardness as to enable the contractor to perform his work within

the time stipulated; and that for a breach of this duty the owner is liable to the contractor for extra work and labor.

In the opinion in *Norcross* v. *Wills*, 198 N. Y. 336; 91 N. E. 803, it is stated:

> "The rule may be assumed to be well settled by the authorities and it is founded in justice that where a party has assumed a positive obligation * * * a corresponding obligation if not expressed in terms will nevertheless be implied as resting upon the other party to whom the agreement runs, to be answerable for all losses caused by delays which his control of the work may make him responsible for, either because the contract itself was not so framed as in the event of their happening either to exempt him or to permit the inference of an intention that responsibility should rest elsewhere."

The above cases in addition to serving as precedents, furnish a background of logic for the rule of law that was universally in effect up to the time of the complained of decision of the Court of Claims.

In *State* v. *Farish, supra*, the contractor was permitted to recover against the State (of Mississippi) for damages due to delay in completing his contract caused by failure of the State's other, independent contractor to timely furnish lumber.

In Volume 9, American Jurisprudence, Section 50, p. 37, under the title "Building and Construction Contracts", is found the following:

> "It appears to be a well settled rule that if a contractor agrees to do work within a specified time and is prevented or delayed in performing the contract by act or default of the other party, or by the acts of persons for whose conduct the latter is responsible, the delay thus occasioned is excused, and the contractor may not be held liable * * * for non-compliance with the terms of the contract."

A Federal District Court case holding the government liable to its prime contractor for delays of another government contractor doing subsidiary work is *Langford* v. *U. S.* 95 F. 933.

The case of *Del Genovese* v. *Third Avenue R. R. Co.*, 13 App. Div. N. Y. 412, is another case where the contractor recovered for delays occasioned by an independent contractor of the owner. In its opinion, the Court said:

> "There can be no question but that under this contract, there was 'an implied understanding by all parties that they (the plaintiffs) were to be unrestricted in the employment of means to perform it (the contract), and that nothing which it was the duty of the owner to do to enable the contractor to perform should be left undone.' " (Citing Mansfield v. N. Y. C. R. R., 102 N. Y. 213.)

But it is in the decisions of the Court of Claims of the United States itself that the principle has found the most solid support (and no criticism) throughout the years.

In deciding *Cotton* v. *U. S.*, 38 C. Clms. 536 (1903) where a prime contractor was delayed by the government's dredging contractor, the Court said:

> "Upon the findings we feel warranted in the conclusion that justice requires that defendant compensate the plaintiffs for the reasonable damages the latter have sustained in consequence of the delay in the prosecution of their work, caused by defendant's dredge contractor's failure to diligently prosecute their work."

Later cases in the Court of Claims without exception have given expression to the same views where the point was involved.

In the case of *Miller* v. *U. S.*, 49 C. Cls. 276, the principle was attacked by the government. In deciding in favor of plaintiff, the Court said:

"Where a contractor is delayed to his injury in the performance of a contract by a breach of contract by the owner, the rule is, of course, elementary that the latter must respond in damages.

"It is contended, however, by the defendants that the delay in this case having been caused by the misconduct of another contractor, they are not liable.

"We know of no authority or reason for such a contention. The defendants were under a reciprocal obligation with the claimant to properly prepare the site where he was to build the pier which he had obligated himself to contruct. Like nearly all of the work done by the defendants, the preparatory work was to be done by another contractor; but in a legal view and in so far as the contractural relation between the claimant and the defendant is concerned, this work was to be done by the latter. If the dredging company failed to perform its contract in time to the damage of the claimant, the latter had no recourse against it because there was no privity of contract between them. It was the defendants and not the dredging company who were under legal obligations to the claimant to prepare the site.

"The case of *Cotton* v. *U. S.* 38 C. Cls. 536, is almost identical with this. In that case the damage to the claimant was caused by the failure of another contractor with the defendants to make a timely preparation of the site where the work contracted to be done was to be performed. And the Court laid down the rule that where a contractor with the government sustains damage caused by the unreasonable delay of another contractor of the defendants to do the work necessarily preliminary to the work of the former, he is entitled to recover of the government."

Other Court of Claims decisions to the same effect are—

Edgemoor v. *U. S.*, 61 C. Cls. 392, where the Court said:

"The government cannot excuse itself upon the theory that the foundations were not ready because the delay was caused by the contractors with whom the government had contracted to have them ready. It took upon

itself the obligation to have the foundations in place for the performance of the work by the plaintiff; the plaintiff cannot be punished because of the failure of a third party to perform a contract with which the plaintiff had nothing to do."

In *Largura* v. *U. S.*, 88 *C. Cls.* 531, the principle was accepted without opposition. Contractor had undertaken the construction of a post office. The government was to furnish models for stone carving. A contract was let by the Treasury Department to an artist to make the designs for the models. His first design of the eagle to go over entrances was a bird with two heads. This and other designs were returned, which resulted in the contractor being delayed several months. The Court granted a substantial recovery for the delay, both government counsel and the Court, apparently, accepting as settled the rule that the government is liable to the builder for delay caused by one of the government's own contractors.

To like effect is the decision in *John Morrell & Co.* v. *U. S.*, 94 C. Cls. 490.

The point under argument was the subject of an annotation in 8 British Ruling Case Law, pp. 631-2. The writer of the annotation reaches the conclusion that the rule "applies where the owner has contracted with a third person for the performance of work the due completion of which is necessary to the performance of an independent contract".

The following American cases are cited: *Nelson* v. *Pickwick Associated Co.* (1889), *supra;* and *W. H. Stubbings Co.* v. *World's Columbian Exposition Co.* (1903), 110 Ill. App. 210.

In the latter case, the Appellate Court, in reversing the lower Court, said (p. 221):

"It is claimed that appellant suffered loss by reason of the delay in getting the buildings in readiness for the

performance of the contracts within the time specified. The propriety of an allowance of claims for damages for such delay when supported by the evidence, has been recognized. *Tobey* v. *Price* 75 Ill. 645-647; *Michigan Ave. M. E. Church* v. *Hearson* 41 Ill. App. 89-92, and the contractor was not obliged to abandon the work and sue for damages, but had the right to proceed to complete it and then claim damages."

The annotation followed a decision by the Scottish Court of Sessions of the Scotch case of *Duncanson* v. *Scottish County Investment Co., Ltd.* (8 B. R. C. 610).

The facts in the *Duncanson* case were that the contractor sued the owner to recover balance of contract price withheld when the contractor failed to complete his share of the work due to the failure of another contractor to get his work done soon enough for the suing contractor to commence performance. The owner counterclaimed on the ground that the suing contractor had failed in his performance by not completing his work on time. The contractor whose failure to get his work timely done had prevented the suing contractor from performing on time, was bound by no time limit in his contract.

The Court held in favor of the suing contractor. Lord Dundas in his opinion said:

> "The pursuers maintain that their undertaking was not absolute and independent but was subject to the implied condition precedent that the other work on the tenements should be completed at such date or dates as to make it possible for the pursuers to finish their department of the work by 15 April 1910.
>
> "I think the pursuer's contention of the contract is the right one. I agree with the learned Sheriff in thinking that the defender's construction is not one which would readily be preserved in the absence of clear and specific expression to that effect * * *."

Lord Gutherie in a separate opinion, justified the court's decision upon the well established principle of building con-

struction law that "there is an implied contract on the part of the owner to keep work in such a state of forwardness as will enable the builder to perform his contract within a time limited".

An analogous rule is firmly established in the Courts of the United States, namely, that in every building construction contract there is an implied agreement that the contractor will not be delayed or obstructed in any manner by the person for whom the work is to be done, and if he is so delayed, he can recover damages for loss so sustained. This long established and undisputed rule furnishes the foundation for the principle of law which petitioner seeks to sustain. The following are selected from many American cases wherein the rule is given application:

Hart v. *American Concrete Steel Co.*, 278 Fed. 541-544;
Ryder Building Co. v. *Albany*, 176 N. Y. S. 456;
Mansfield v. *N. Y. C. & H.*, 102 N. Y. 205; 6 N. E. 386;
Cliff v. *Dupont Engineering Co.*, 298 Fed. 649;
Norcross v. *Wills*, 198 N. Y. 336; 9 N. E. 803;
Stehlin-Miller-Henes Co. v. *Bridgeport*, 97 Conn. 657; 117 Atl. 811;
United States v. *United Engineering Co.*, 234 U. S. 236.

Petitioner has been able to find no law contra to its position on the main point under discussion, and logical reasoning with respect thereto certainly does not give any support to the "clear sky" position of the Court below:

> "The very assumption of such a covenant on the part of the builder (to complete the structure within a limited time) implies an understanding by all parties that they were to be unrestricted in the employment of means to perform it, and that nothing which it was the duty of the owner to do to enable the contractor to perform, should be left undone. It is unreasonable to suppose that the parties intended to enter into obligations, providing for the performance of work by one party under

> a heavy penalty for non-performance within a given period, which yet left it optional with the other to facilitate or retard such work at its pleasure or discretion." *Mansfield v. N. Y. C. & H., supra.*

Petitioner was given no opportunity below to argue this point, either in its brief or orally. Government counsel had conceded it in their brief, and they did not mention the point at all in oral argument. The first intimation that the point was involved insofar as petitioner's counsel were concerned was when the opinion was promulgated. It is useless for petitioner to speculate why the Court below saw fit to make such an unusual ruling, of its own notion and without explanation of any sort. Petitioner's counsel are, of course, familiar with the general rule in negligence law, that a defendant cannot be held liable for the negligent acts of an independent contractor. But that rule has no application in contract law, and likewise its basic logic is predicated upon factors not existent here. In any event, if the rule of contract construction law is to be changed, legal posterity deserves some formal statement of the reasons for the change. The Court below gave none, assuming the rule was clear. Whether this Court might agree or disagree with the rule as announced below, it is submitted that it should take jurisdiction in order either to give its sanction to the new rule or to correct the substantial injustice done petitioner.

The Court below was in error in holding defendant not liable for additional work, essential to completion of the contract structures, which resulted from the furnishing by the Government of Faulty, Inconsistent and Inadequate plans.

The Court below found, with respect to petitioner's claim for additional plastering and furring—

> "It was found, however, that a great many horizontal and vertical pipes had to be run in places not shown

by the drawings, due to discrepancies between the mechanical and architectural drawings, of which there were about 500. The location of the pipes was determined by the defendant's superintendent of construction as the work progressed. This required the contractor to do a great deal of furring not called for by the drawings. This was done by plaintiff at the direction of the defendant's superintendent of construction. It was an extra made necessary by defendant's defective drawings, but plaintiff is barred from recovery therefor by Article V of the contract, quoted above."

Article V provided:

"Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order."

The Court below was in error in treating this item of claim as "extra work" within the meaning of Article V. Because of the 500 discrepancies between the architectural and mechanical drawings, the location of thousands of horizontal and vertical pipes had to be "determined by the defendant's superintendent of construction as the work progressed". It is obvious that the contract structures could never have been completed if these pipes and risers had not been installed; and due to the faulty plans furnished by the government no one could tell just where they were to be installed except piece by piece as the work progressed. The pipes and risers likewise had to be furred, and it would have been impossible to have written a change order and inserted therein a definite price for the additional furring under the circumstances recited. The only way the buildings could have been finished was by the method pursued: the locations of pipes and risers was determined as the work progressed, step by step; this necessitated extra plastering and furring by petitioner, who was told to present its claim

after the job had been done, when it would know what the cost would be.

The Court of Claims allowed petitioner two items of claim for additional work, one for repairing and the other for brushing plaster, both jobs having been caused by failure of the government to furnish heat. The theory upon which the Court permitted recovery was that the failure to furnish heat constituted a breach of the contract, and defendant hence was liable for resulting damages.

It is difficult for petitioner to see the legal distinction between those items of claim and the instant one. The instant item of claim grew out of a breach by the defendant of its contract through failure to supply workable plans. As the Court below found, there were about 500 discrepancies between plans that should have dove-tailed. Certainly, it was an implied condition of the contract that the government as owner would supply accurate and usable plans and specifications. It did not fulfill this obligation, forcing its superintendent of construction to make plans as the construction progressed. The furnishing of these faulty plans constituted as much a breach of contract as the failure to furnish heat, and if petitioner was entitled to recover for the additional work of repairing and brushing plaster, it should have been allowed its damages resulting from the government's failure to furnish proper plans—especially when the additional work in question was an integral part of an essential to production of a completed structure.

Petitioner's claim for additional labor charges on plaster and furring, due to failure to furnish heat and because of delay by the mechanical trades, should have been allowed.

Petitioner proved that because of delay, partly occasioned by the admitted failure of the government to furnish heat pursuant to its contract obligation and partly due to dis-

organization of the work of the mechanical trades, it incurred additional labor charges of $13,809.73 in doing the contract plastering and furring. As stated hereinbefore, this item of claim received no specific mention in the opinion below. It is probable that the Court assumed what it had said about delays in general covered the matter. If that be true, disallowance by the Court below of this item resulted from petitioner's failure to segregate its proof so as to show how much of the delay was due to the direct fault of the government and what portion to the fault of the government's mechanical contractor. Hence, this item must stand or fall upon the same arguments submitted on the main question.

Respectfully submitted,

NORMAN B. FROST,
FRANK N. MYERS,
FREDERIC N. TOWERS,
Attorneys for Petitioner,
Standard Accident Insurance Company.

APPENDIX 1

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. 43813

(Decided January 8, 1945)

JOSEPH A. HOLPUCH COMPANY v. THE UNITED STATES

Mr. Norman B. Frost for the plaintiff. *Mr. George M. Weichelt* was on the briefs.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis H. Shea*, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special Findings of Fact

1. Joseph A. Holpuch Company, named as plaintiff herein, was chartered as a corporation of the State of Illinois, January 17, 1913, to engage in the general building construction business.

On June 8, 1931, the Superior Court of the County of Cook, State of Illinois, by decree of that date declared the corporation dissolved and its charter and authority null and void for failure to file statutory reports and pay franchise taxes.

On February 29, 1936, the same court entered the following decree.

> This cause coming on this day to be heard upon the stipulation this day filed in the above-entitled cause by the above-entitled parties, and the Court being fully advised in the premises, finds, that Joseph A. Holpuch Company has filed all necessary annual reports due up to the present time, and that it has paid all franchise taxes and penalties thereon.
>
> Therefore, it is ordered, adjudged, and decreed that the decree entered in the above-styled cause on the 8th

day of June, 1931, dissolving the said defendant corporation, be and the same is hereby vacated, set aside and held for naught.

* * * * * * *

2. On December 30, 1931, the plaintiff entered into a contract, No. VAc 110, with the defendant, represented by L. H. Tripp, Director of Construction, Veterans' Administration, as contracting officer, whereby, for the consideration of $788,600.00, the plaintiff agreed to furnish all labor and materials and perform all work required for constructing and finishing complete at the Veterans' Administration Home, Leavenworth, Kansas, a Hospital Building and tunnel and Nurses' Quarters, including roads, retaining wall, walks, grading and drainage in connection with these buildings, and removing and relocating the existing Governor's residence and Quartermaster's residence, providing the roads, walks, grading and drainage in connection with the two relocated buildings, but not including plumbing, heating, electrical work, outside service connections, electric elevators and refrigeration plant in connection with the Hospital Building and Nurses' Quarters, all according to designated specifications, schedules and drawings made a part of the contract.

By the contract it was agreed the work was to be commenced within 15 calendar days after date of receipt of notice to proceed, and was to be completed within 300 calendar days thereafter.

Notice to proceed was received by the plaintiff January 18, 1932. The work accordingly was to be commenced by February 2, 1932, and was to be completed by November 13, 1932.

3. The plaintiff began work on the contract within the agreed time. On April 1, 1932, the contracting officer terminated plaintiff's right to proceed with the work on the ground that it was not proceeding with sufficient diligence to insure completion within the agreed time.

Article 9 of the contract provided in part as follows:

> Article 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its com-

pletion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. * * *

4. The plaintiff endeavored to get the order of termination vacated and its contract reinstated. For that purpose its representative, together with a representative of plaintiff's surety on its performance bond, Standard Accident Insurance Company, visited the contracting officer in Washington, D. C., and presented plaintiff's request to that officer. The contracting officer refused to set aside the order of termination.

In view of the fact that a large proportion of the work had already been let by the plaintiff to subcontractors, and that the cancellation of the subcontracts would probably result in delays, litigation and increased cost of performance, it was arranged among the interested parties that the surety should undertake performance of the remaining work under the terms of the original contract, that the surety should sublet such work to the plaintiff thus keeping the subcontract structure more or less intact, that the contract price should be paid by the surety to the plaintiff, and that the management of the work should be taken away from John V. Hawkins and placed in the hands of Mads Madsen, who operated under the name of Mads Madsen & Company, and who was plaintiff's subcontractor on concrete and cement work.

By contract between Standard Accident Insurance Co., plaintiff's surety, and the plaintiff, April 25, 1932, the plaintiff agreed, as the surety company's subcontractor, to perform all the work originally agreed to be performed, including changes, past and future, but not including work already performed, all at the original contract price as amended by defendant's changes, the Holpuch Company to receive direct a proportionate amount for the work already done.

The management of the work was placed in the hands of Mads Madsen by contract to that effect between plaintiff and Mads Madsen April 12, 1932.

No formal contract, other than the original contract with the plaintiff and the bond of the surety for performance, was signed by the contracting officer.

The defendant has paid directly to the plaintiff, for work performed by the plaintiff before termination of its contract, the sum of $5,130.00 as part of the contract price.

5. Article 15 of the contract reads as follows:

> *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

No written appeal to the head of the department was taken by plaintiff from the finding of the contracting officer that the plaintiff was not proceeding with such diligence as to insure completion by the completion date.

6. No findings are made as to whether or not plaintiff was proceeding with the necessary diligence, nor on any damages that may have been suffered by plaintiff on account of the termination of the contract.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and its petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

WHITAKER, Judge, delivered the opinion of the court:

On December 30, 1931, an association known as the Joseph A. Holpuch Company entered into a contract with defendant to construct a hospital building and nurses' quarters at the Veterans' Administration Home at Leavenworth, Kansas. The work was to be commenced within 15 calendar days after receipt of notice to proceed and was to be completed within 300 calendar days thereafter. Notice to proceed was received by plaintiff on January 18, 1932, fixing the date for commencing the work as February 2, 1932, and the date of completion as November 13, 1932.

On April 1, 1932, the contracting officer terminated plaintiff's right to proceed on the ground that it was not proceeding with sufficient diligence to insure completion within the agreed time. Plaintiff contends that this action was arbitrary, capricious, and unreasonable and, therefore, a breach of the contract. It sues for damages resulting therefrom.

The first defense raised by the defendant is that at the time the contract was entered into Joseph A. Holpuch Company, plaintiff, was not a corporation as it held itself out to be, and that it was not a corporation when this suit was brought on January 12, 1938.

On the trial of the case before the Commissioner the defendant introduced an order of the Superior Court of Illinois, dated June 8, 1931, dissolving the plaintiff company for failure to pay its franchise taxes. Defendant's counsel stated that this order was introduced for the sole purpose of reflecting on the credibility of the witness then under examination, Joseph A. Holpuch; but defendant now seeks to use it in support of its defense that plaintiff was not a corporation either at the time the contract was signed or at the time this suit was brought. Since plaintiff had no notice until after the closing of the testimony that defendant

intended to use the decree of dissolution in support of its defense of *nul tiel* corporation, on plaintiff's motion we permitted it to file at the argument of this case a certified copy of a later decree of the Superior Court of Illinois, dated February 29, 1936, vacating the former decree of dissolution.

This latter decree recited that it appearing—

> * * * that Joseph A. Holpuch Company has filed all necessary annual reports due up to the present time, and that it has paid all franchise taxes and penalties thereon.
>
> Therefore, it is ordered, adjudged and decreed that the decree entered in the above-entitled cause on the 8th day of June 1931, dissolving the said defendant corporation, be and the same is hereby vacated, set aside and held for naught.

* * * * * * *

The corporation that had been previously dissolved was by this decree reinstated and reclothed with all its former powers as though the original decree of dissolution had never been entered. By its terms the dissolution decree was set aside and held for naught. The court's right to take this action is not questioned, *Ruthfield* v. *Louisville Fuel Company*, 312 Ill. App. 415, 38 N. E. 2d, 832, and so from this date on the situation was as if the dissolution decree had never been entered. The plaintiff, therefore, at the time this suit was brought had capacity to sue.

Whether or not it can maintain an action on a contract entered into between the date of the dissolution decree and of the decree setting it aside is not so clear. Except for the decree setting aside the decree of dissolution, we think the corporation could not have maintained an action on, or one for the breach of a contract entered into after its dissolution. *Bates Co.* v. *United States*, 77 C. Cls. 611, 618, 3 F. Supp. 245; *Zahn Co., et al.* v. *United States*, 79 C. Cls. 215, 220, 6 F. Supp. 317; *Chicago Title & Trust Co.* v. *Wilcox Building Corp.*, 302 U. S. 120, and cases there cited; *Berg Shipbuilding Co. et al.* v. *United States*, No.

45256, this day decided. The authorities are in conflict over whether it can do so after entry of a decree vacating the decree of disolution. The Court of Civil Appeals of Texas held in *Lyons* v. *Texorado Oil and Gas Company*, 91 S. W. (2d) 375, that after reinstatement a corporation could maintain an action on a contract entered into in the interim; and the Supreme Court of Oregon in *Gillen-Cole Co.* v. *Fox & Co.*, 146 Ore. 208, 29 P. (2d) 1019, held the same thing, where the contracts had been ratified after reinstatement. To the contrary is the opinion of the Supreme Court of California in *Ransome-Crummey Co.* v. *Superior Court*, 188 Calif. 393, 205 P. 446. Cf. *McClung et al.* v. *Hill et al.*, 96 F. (2d) 236.

However, under the facts disclosed in the case at bar, we are of opinion that the decree vacating the dissolution decree was intended to put the plaintiff corporation in the same situation as it would have been in had it paid its franchise taxes when due. This is because the decree vacating and setting aside and holding for naught the former decree was predicated on the fact that the taxes in default had been paid and that penalties had been paid for failure to pay them when due. Had the taxes been paid when due, there would have been no basis for the entry of the dissolution decree. Their subsequent payment, together with the payment of penalties for non-payment when due, removed the reason for the dissolution and put the corporation in the same situation it would have been in had the taxes been paid when due. At any rate, we think this was what the court intended to accomplish when it entered the decree dissolving the dissolution decree.

It would be inequitable for the State to collect taxes levied on the privilege of doing business as a corporation and at the same time deny to the corporation the right to exercise the privilege. So when it accepted payment of taxes in default, together with penalties, and set aside the dissolution decree, we think it intended to validate the exercise of the corporate franchise in the years for which the taxes were paid.

Contracts entered into without the payment of license taxes are void only because the laws of the State imposing

the taxes make them void, either expressly or by implication. We will not assume that the State of Illinois intended to accept taxes on the exercise of the corporate franchise and at the same time make the corporation's contracts illegal because it was not authorized to exercise the franchise.

If the effect of the decree setting aside the dissolution decree is what we have supposed, the defendant here cannot complain; its rights were in nowise prejudiced thereby. Only the State levying the taxes is interested in the nonenforcement of contracts entered into without prior payment of them. The other contracting party is not injured thereby. If defendant has breached its contract with plaintiff, certainly it should not escape liability therefor because the corporation did not pay its taxes when due, where the State, in consideration of the payment of penalties, has forgiven the corporation therefor.

We think it was the purpose of this decree vacating the dissolution decree to give validity to all acts done in the meantime and, hence, we conclude that plaintiff can maintain an action for the breach of a contract entered into between the dates of the two decrees.

The defendant also raises the defense that plaintiff cannot recover, whatever the merits, because it failed to pursue the procedure laid down by the contract for the adjustment of the dispute which arose between it and the contracting officer as to whether or not it was prosecuting the work with such diligence as would insure completion of the contract within the time required. We think this defense is good.

Article 9 of the contract provides in part:

> If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extention thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. * * *

On April 1, 1932, the contracting officer wrote plaintiff in part as follows:

> This will confirm telegram of this date reading as follows:
>
> "Since you have failed to so prosecute the work under your contract dated December thirtieth nineteen hundred thirty-one for construction work Veterans Administration Home Leavenwoth Kansas with such diligence as to insure its completion by the time stipulated therein you are notified that your right to proceed with the work is hereby terminated Stop This is done in accordance with article nine of the contract" * * *.

Thus the contracting officer found that the plaintiff was not prosecuting the work under its contract with such diligence as to insure its completion by the stipulated date. This is final under article 15 of the contract, in the absence of appeal. This article provides:

> * * * all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. * * *

Whether or not the plaintiff was proceeding with the requisite diligence was clearly a question of fact, made conclusive upon the parties, subject only to appeal to the head of the department.

When the plaintiff received the letter of the contracting officer it did not file a written appeal to the head of the department. Instead, its representative, together with the representative of its surety on its performance bond, Standard Accident Insurance Company, came to Washington to see the contracting officer in an effort to get him to set aside his order terminating plaintiff's right to proceed. The contracting officer refused to do so. No written appeal was then taken to the head of the department. Instead, an arrangement was worked out between the Veterans' Administration

and the surety company, whereby the surety agreed to take over performance of the remaining work under the contract and to sublet it to plaintiff, with the understanding that plaintiff's former general superintendent, John V. Hawkins, should be replaced by a man by the name of Madsen. Pursuant to this understanding, the surety company and plaintiff entered into a contract on April 25, 1932, under the terms of which the plaintiff agreed, as the surety company's subcontractor, to perform all the remaining work under the contract, with the understanding that the defendant should make payments due thereunder to the surety, and that the surety in turn would transmit said payments to plaintiff. The contract was completed under this arrangement.

It, therefore, appears that instead of appealing from the finding of fact by the contracting officer, on the basis of which he terminated the conract, plaintiff acquiesced therein and entered into a substitute arrangement for the further performance of the contract.

Plaintiff, therefore, is bound by the contracting officer's finding that it was not pursuing the contract with such diligence as would insure its completion on time. This fact justified the contracting officer in terminating the contract.

Plaintiff, therefore, is not entitled to recover whatever damages may have been suffered thereby.

The commissioner finds that the plaintiff has been paid the sum of $5,130.00 for work done under the contract prior to its termination. Plaintiff takes no exception thereto and does not now contend that any more is due for work done prior to the termination of the contract.

Since it is clear that plaintiff is not entitled to recover, for the reasons stated, we do not consider whether or not the contracting officer was in fact justified in terminating the contract, nor whether plaintiff was damaged thereby.

Plaintiff's petition will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice,* concur.

JONES, *Judge,* took no part in the decision of this case.

A true copy.

Test:

—— ——, Clerk, Court of Claims of the United States.

APPENDIX 2

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. 43808

(Decided January 8, 1945)

STANDARD ACCIDENT INSURANCE COMPANY
v.
UNITED STATES

Mr. Norman B. Frost for plaintiff. *Mr. George M. Weichelt* was on the brief.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following:

Special Findings of Fact

1. The plaintiff, Standard Accident Insurance Company, is a corporation organized and existing under the laws of the State of Michigan.

2. On January 8, 1932, the plaintiff obligated itself by bond as surety for the performance by Joseph A. Holpuch Company of the terms of a contract between the Joseph A. Holpuch Co. and the United States, No. VAc 110, entered into December 30, 1931, the United States being represented by L. H. Tripp, Director of Construction, Veterans' Administration, as contracting officer, whereby, for the consideration of $788,600.00, the Holpuch Company agreed to furnish all labor and materials and perform all work required for constructing and finishing complete at the Veterans' Administration Home, Leavenworth, Kansas, a Hospital Building and tunnel and Nurses' Quarters, including roads, retaining wall, walks, grading and drainage in connection with these buildings, and removing and relocating the existing Governor's residence and Quartermaster's residence, providing the roads, walks, grading and drainage in con-

nection with the two relocated buildings, but not including plumbing, heating, electrical work, outside service connections, electric elevators and refrigeration plant in connection with the Hospital Building and Nurses' Quarters, all according to designated specifications, schedules and drawings made a part of the contract.

The work was by the contract agreed to be commenced within 15 calender days after date of receipt of notice to proceed and was to be completed within 300 calendar days thereafter.

Notice to proceed was received by the Holpuch Company January 18, 1932. The work accordingly was to be commenced by February 2, 1932, and was to be completed by November 13, 1932.

3. Articles 3, 5, 6, 9 and 15 of the contract read in part as follows:

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.
>
> ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be

allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

ARTICLE 6. * * * The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such material, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforesee-

able causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

4. The Holpuch Company began work on the contract within the agreed time. On April 1, 1932, the contracting officer terminated the Holpuch Company's right to proceed with the work, on the ground that it was not proceeding with sufficient diligence to insure completion within the agreed time.

5. The Holpuch Company endeavored to get the order of termination vacated and its contract reinstated. For that purpose its representative, together with a representative of the plaintiff, visited the contracting officer in Washington, D. C., and presented the Holpuch Company's request to that officer. The contracting officer refused to set aside the order of termination.

A large proportion of the work had already been let by the Holpuch Company to subcontractors. In view of that fact, and that the cancellation of the subcontracts would probably result in delays, litigation and increased cost of performance, it was arranged among the interested parties that the plaintiff should undertake performance of the remaining work under the terms of the original contract, that the plaintiff should sublet such work to the Holpuch Company, thus keeping the subcontract structure more or less intact, that the contract price should be paid by the surety (plaintiff) to the Holpuch Company, and that the management of the work should be placed in the hands of Mads Madsen, who operated under the name of Mads Madsen & Company, and who was Holpuch Company's subcontractor on concrete and cement work.

By contract between the plaintiff and the Holpuch Company dated April 25, 1932, the Holpuch Company agreed, as plaintiff's subcontractor, to perform all the work originally agreed to be performed, including changes, past and future, but not including work already performed, all at the original contract price as amended by defendant's changes, the Holpuch Company to receive directly a proportionate amount for the work already done.

The management of the work was placed in the hands of Mads Madsen by contract to that effect between the Holpuch Company and Mads Madsen April 12, 1932.

No formal contract, other than the original contract with the Holpuch Company and the bond of the plaintiff for performance, was signed by the contracting officer.

6. The plaintiff proceeded with the work the latter part of April 1932, under the arrangement thus made, and it was substantially completed June 30, 1933, being 229 days beyond the original contract time.

Thereafter the plaintiff was paid the full contract price, including prices on change orders, and plaintiff turned such receipts over to the Holpuch Company, except that the sum of $5,130, part of the contract price, was paid by the defendant directly to the Holpuch Company for work done prior to termination of its contract as heretofore related.

7. *Barrel bolts on window screens*, $387.20. Barrel bolts on the window screens were supplied by the plaintiff according to samples submitted and accepted. Their installation as shown on the contract drawings placed them in an inoperative position. The plaintiff's and defendant's superintendents and the contractor having their installation conferred on the difficulty and decided to place the bolts in a different position.

The bolts were for the purpose of preventing the screens from warping outwardly in the center.

They were installed as agreed, but with a certain lack of uniformity. On final inspection by the Government's officers, some of the installations were objected to and the plaintiff was required to change them to conform to the ideas of defendant's superintendent of construction, and the plaintiff made the change.

The reinstallation required made a more workmanlike job.

The cost to the plaintiff of the change amounted to $387.20 including overhead and profit.

Claim therefor, in the sum of $387.20, was made by plaintiff to the Comptroller General November 16, 1934, and it has not been paid.

8. *Changes in installation of marble*, $173.03. The plaintiff waives this item of its claim.

9. *Access panels*, $535.43. Section 18 C 6 (a) of the contract specifications provided that: "Where shown or directed in hollow tile partitions or in ceiling or wall furring for access to concealed traps, valves, machinery, etc., there shall be provided doors of No. 16 U. S. Standard gauge sheet steel." This provision was under the heading "Standard Specification for Fire Resisting Doors, etc."

The plans showed the location of numerous access panels. Such panels are designed to give access to concealed traps, valves, pipes, machinery, electrical work, etc.

The plaintiff installed 61 more access panels than were shown on the plans.

While the plaintiff was installing access panels shown by the plans, defendant's superintendent of construction examined the situation and ruled that plaintiff must install

these additional access panels under the drinking fountains and other places of installation not shown by the plans. The plaintiff proceeded to do so and installed 61 of them. Defendant's construction superintendent submitted his ruling to the Veteran's Administration in Washington, D. C., which ruled that they were not to be installed. Their installation has not been paid for. The cost thereof, including profit and overhead, was $535.43.

Following correspondence on the subject the plaintiff's general superintendent, Mads Madsen, made claim September 30, 1933, addressed to the Director of Construction, Veterans' Administration, for this amount.

Prior thereto, beginning the early part of February 1933, the plaintiff, in correspondence with the contracting officer through his local superintendent of construction, had asserted claims for the cost of the additional access panels. The accepted practice in force was for plaintiff's representative to communicate with the contracting officer by routing his letters thereto through the local superintendent of construction.

10. *Membrane waterproofing,* $332.75. Article 5 (a) of section 14 C of the specifications is as follows: "Where promenade tile roofs are required, the membrane waterproofing shall cover the entire area below the concrete and tile topping, except as otherwise specified under 'Roofing'."

There were two corridors connecting buildings under construction which were open to the weather at the sides. Contract drawing No. 202 showed that the floors of these exposed corridors were to be provided with membrane waterproofing.

A dispute arose between the parties as to whether the contract required this membrane to be laid in the exposed corridors. The contracting officer ruled that it was to be laid and it was laid.

Article No. 2 of the contract provided that: "Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both."

The plaintiff did the work under protest, submitted a bill to the Veterans' Administration December 27, 1932, for the actual cost, plus profit and overhead, a total of $332.75, and it has not been paid.

11. *Wood terrazzo grounds*, $3,993.00. The specifications, section 12 CC (6), with reference to terrazzo base, provided: "Base shall be run plumb, level, true and straight with neatly formed cove and rounded top. When sufficiently hardened, rub surface with an electric base rubbing machine or by hand in places where machine cannot reach, using a coarse abrasive for first rubbing after which a coating of neat portland cement of approved color shall be applied, well rubbed into surface holes, interstices and voids. The finishing of base, borders and thresholds shall consist of polishing all plain and curved surfaces with a fine stone to level, plumb, true and smooth finish."

Section 22 C (11) of the specifications provided: "Where required, terazzo base as provided under 'Terrazzo' (Section 12 CC) shall be installed before plastering. Plastering shall always begin at top of base or bottom of partition in order to insure a straight, true wall."

In order to run plumb, level, true and in a straight line the terrazzo base required temporary wood grounds, which acted as a guide for the mold when the terrazzo base was being laid. After the terrazzo base had been constructed, the temporary grounds were removed and scrapped and the plastering begun from the base upward as required by Section 22 C (11) of the specifications.

Temporary wood grounds were considered necessary in good practice and were necessary to do a workmanlike job, but no mention was made of them in the specifications.

In subletting the work the prime contractor made no provision for the temporary grounds, and a dispute arose on the job as to what subcontractor was obligated to erect the temporary grounds. The defendants' officers were not a party to the dispute, and confined their ruling to a decision that temporary grounds must be used, and they were used under protest made to the Veterans' Administration.

The Veterans' Administration, in reply to the plaintiff's protest, wrote the plaintiff November 4, 1932, that the mat-

ter of setting temporary grounds was one to be settled between the plaintiff and its subcontractors, and not for the Veterans' Administration to decide.

There was some delay in laying the terrazzo base. In order to hasten the work of the plasterer the defendant's superintendent of construction on the job ordered plastering to proceed notwithstanding the base had not all been laid. To do this temporary wood grounds were necessary for the line between plaster and rounded top of the terrazzo base. On October 10, 1932, the superintendent gave the plaintiff the following order:

> You will proceed to set plaster grounds as called for in Section 24 C, Page 4, Item 19 of the Specifications.
>
> This will be done in order to enable the plasterers to work. The job has been delayed at least one week due to the controversy over the setting of these grounds.

Section 24C (19) of the specifications provided, under the general heading of "Carpentry:"

> Wood grounds shall be provided where shown or required for plastering, for securing all wood trim or other finished woodwork and for securing the work of all trades.

Plastering before the terrazzo base has been installed is bad practice, and not commonly done, due to probable injury and discloration. In good practice the terrazzo base is set before plaster and floor, and gives a ground both for the plaster and the floor level to work to. Where plastering precedes the laying of the terrazzo base, the rubbing of the terrazzo to smooth it down is likely to injure the plaster.

The cost of installing the temporary wood grounds was $2,994.75 and that of removing them was $998.25, a total of $3,993.00, inclusive of overhead and profit. This cost has not been reimbursed the plaintiff.

12. *Sash lifts*, $467.16. The plaintiff withdraws its claim for cost of additional sash lifts.

13. *Repair of plaster cracks,* $497.23. Under the heading of "General Conditions" in the specifications there appears Section No. 34, "*Temporary Heat,*" as follows:

> The contractor shall furnish heat to prevent injury to work or material through dampness or cold. At all times when there is concrete not thoroughly set, and after starting to apply the first coat of plastering, he shall maintain a temperature of at least 40° F. For 10 days previous to the placing of the interior wood finish and during the time that varnish is being applied, a temperature of at least 70° F. shall be maintained in the building.
>
> The temporary heat may be obtained by connecting the radiators for the buildings to the present lines of the heating system at the station at such points as designated by the superintendent. All connections shall be made by the contractor at his own expense but the necessary steam for heat will be furnished by the Government, at no expense to the contractor.
>
> The use of salamanders or other types of heating which may smoke and damage the finished walls, etc., will not be allowed.

The heat for the project came from a power plant maintained by the Government on the premises. This plant was not of sufficient capacity to maintain heat in the Veterans' Home and in the buildings under construction at the same time during extremely cold weather. While plastering was being done in the new buildings the heat therein was suddenly shut off in freezing weather, for humanitarian reasons, to give the existing Veterans' Home adequate heat. The plaster applied and being applied was wet and in that condition froze. The freezing caused the plaster to disintgrate and the defendant's superintendent ordered it patched and replaced, and it was patched and replaced. After the damage was done, defendant's superintendent ordered plastering to be discontinued for the time being.

The plastering subcontractor protested aginst the extra work and was told by the defendant's superintendent to record the cost and submit its claim to the proper officials.

On December 28, 1932, the plaintiff communicated with the contracting officer by letter complaining of this situation and asking relief from damages caused by lack of heat.

May 26, 1933, following a previous proposal, the plaintiff submitted to the Veterans' Administration, a revised proposal for settlement of its claim for repairing the damage to plaster by reason of lack of heat in the amount of $497.23, which was the actual cost plus overhead and profit. This the contracting officer denied June 21, 1933, on the ground that the contract did not provide for payment of an item of this nature. The profit included amounted to $45.20.

14. *Brushing plaster*, $738.30. Due to the lack of heat, as stated in Finding No. 13 herein, considerable areas of the last coat of plaster, the white coat, disintegrated. Defendant's construction superintendent decided that these areas needed resurfacing and ordered the plaintiff to resurface.

The plaintiff did this, under protest, and at a cost of $738.30, including a profit of $67.11. January 13, 1933, and again May 26, 1933, the plaintiff claimed of the contracting officer extra compensation in the approximate amount here sued for, and it has not been paid.

15. *Extra furring*, $13,403.97. The specifications required all pipes to be covered, furred in and plastered.

Paragraph No. 11 (d) (e) of Section 2 C of the specifications under the heading of "Concrete Work and Materials" provided:

> (d) Build into the construction all wall ties, anchors, wood blocks, inserts for support of pipe hangers, etc., hangers for suspended ceilings, nailing strips, grounds, etc., required or as hereinafter specified.
>
> (e) Also build in sleeves for pipe lines as furnished and located by contractor for Heating, Plumbing and Electric Work, etc. Wherever these sleeves or fixtures interfere with beams or girders, etc., the contractor shall provide special slag and beam construction as required to take care of these conditions.

Paragraph No. 2 of Section 22 C of the specifications under the heading of "Lathing and Plastering" provided:

> Except in unfinished rooms, all vertical and horizontal pipes, ducts, etc., for plumbing and heating work not enclosed by masonry or wood furring, shall be concealed by steel furring, metal lath and plaster, unless otherwise shown or directed. Where suspended ceilings are indicated for basements, all heating and water mains shall run exposed under the ceilings.

Under the heading of "General Conditions for Heating" the specifications, paragraph No. 2 of Section 1 H provided:

> Risers shall be run generally concealed in furring or partitions unless indicated otherwise.
>
> Runouts from risers to radiators on upper floors shall be run concealed in furred ceilings below slab unless indicated otherwise.

There were about 500 discrepancies between the mechanical and the architectural drawings, and this number was unusual. A great many horizontal and vertical pipes had to be run in places not shown by the drawings, and the location of their installation was determined by defendant's superintendent of construction from time to time as the work progressed. Pipes had to be run so as to avoid structural members and this often entailed furring not disclosed by the drawings.

Furring shown in the drawings for pipes in the Nurses' Home was not shown in the drawings for corresponding pipes in the other buildings.

The plaintiff furred in all pipes as directed by the defendant's superintendent of construction. The cost of doing so on furring not shown by the drawings amounted to $13,403.97, inclusive of overhead and profit, and it has not been reimbursed to the plaintiff.

16. *Re-laying linoleum,* $204.19. This claim has been abandoned by the plaintiff.

17. *Adjusting windows,* $613.77. In fitting the window sash into their frames the plaintiff allowed the customary

clearance in order that the sash might be moved freely up and down. Thereafter, while plastering was in progress and by reasons thereof moist conditions prevailed in the buildings and the sash swelled and became too tight for operation. In this situation the defendant's superintendent of construction ordered the plaintiff to reduce the width of the sash by shaving or planing, to which the plaintiff objected, on the ground that when the sash became dry again they would be too loose.

The superintendent insisted on their alteration and plaintiff, under protest, made the change. Upon final inspection the sash had become dry, and rattled in their frames. Defendant's officers ordered maple strips to be tacked to the side of the sash to bring the sash back to their proper original width. This was done by the plaintiff at a cost of $613.77, including overhead and profit. The plaintiff filed a claim for this amount with the Comptroller General November 16, 1934, and it has not been paid.

18. *Damages for delay.* Simultaneously with contract No. VAc 110 the defendant entered into a contract December 30, 1931, with the P. H. Meyer Company, of Louisville, Kentucky, covering work by the mechanical trades, such as plumbing, heating, electrical work, outside service connections.

The Meyer contract provided that work should "be commenced promptly after date of receipt of notice to proceed" and "be completed at a date not later than that provided in the contract for General Construction."

The Meyer Company was lacking in diligence in the doing of the work under its contract, as a result of which plaintiff was delayed. The defendant on March 31, 1933, terminated the Meyer Company's right to proceed, and itself took over the doing of the work required by the Meyer contract. After defendant took over this work plaintiff was further delayed by the plumbing, heating and electrical work.

The amount of the delay caused by the Meyer Company and the amount caused by the defendant is not shown, nor does the proof show the damage resulting from the delay by the Meyer Company and by the defendant.

19. The final payment made to the plaintiff on the contract through certification of the General Accounting Office was on or about the latter part of August 1937. By this certification liquidated damages for delay theretofore assessed were remitted and plaintiff was relieved altogether from payment of such damages.

Plaintiff's final voucher against the defendant for the balance of the contract price contained the following indorsement:

> I certify that the above bill is correct and just and that payment therefor has not been received, but this payment is not to be considered final settlement of our contract, and is accepted under protest since certain claims and amounts (as per attached statement) have not been included in this voucher. Standard Accident Insurance Co.

The claims and amounts referred to were as follows (the serial numbers and captions of the findings herein being used for convenient reference):

Finding:

7. *Barrel bolts on window screens,* $387.20.
9. *Access panels,* $535.43.
10. *Membrane waterproofing,* $332.75.
11. *Wood terrazzo grounds,* $3,993.00.
13. *Repair of plaster cracks,* $497.23.
14. *Brushing plaster,* $738.30.
15. *Extra furring,* $13,403.97.
17. *Adjusting windows,* $613.77.
18. (b) *Installing screens,* $968.00.
    (c) *Carpentry and insurance,* $4,203.15.
    (d) *Lathing and plastering,* $16,170.78.
    (f) *Field overhead,* $11,898.02.
    (g) *Temporary radiators,* $3,388.00.
    (i) *Progress photographs,* $166.62.
    (j) *Additional travel,* $3,902.25.
    (k) *General overhead,* $14,141.45.

The last two items are combined as one item, together with another for cost of engineers' reports, now withdrawn by the plaintiff. There are other items in plaintiff's reservation to the final settlement either withdrawn or not involved herein.

20. There is no evidence of appeal to the head of the Veterans' Administration on any item of claim made herein.

None of the work involved herein was covered by an order in writing for changes or an order for extra work.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover $1,123.22.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of one thousand one hundred twenty-three dollars and twenty-two cents ($1,123.22).

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff was the surety on the performance bond of the Joseph A. Holpuch Company, which had a contract for the erection of a hospital building and nurses' quarters at the Veterans' Administration Home at Leavenworth, Kansas.

On April 1, 1932, the Holpuch Company's contract was terminated, due to, according to the findings of the contracting officer, its failure to proceed with such diligence as would insure completion of the contract by the agreed date. Thereafter, plaintiff and the Veterans' Administration entered into an arrangement, under which plaintiff agreed to take over performance of the contract and sublet it to Joseph A. Holpuch Company. Pursuant to this agreement, plaintiff and the Holpuch Company entered into a contract on April 25, 1932, whereby the Holpuch Company agreed, as the plaintiff's subcontractor, to perform all work required by the contract. Thereafter, all payments due from the defendant were made to the plaintiff and the plaintiff in turn transmitted them to the Holpuch Company.

In this suit plaintiff sues for certain excess costs incurred for work done which it alleges was not required by the contract, and it also sues for damages for delays caused by an independent contractor who had a contract with defendant for the installation of the plumbing and other mechanical work.

Defendant defends, first, on the ground that whatever excess costs may have been incurred and whatever damages may have been sustained were incurred and sustained by the Holpuch Company and not by plaintiff and, therefore, it says plaintiff cannot recover.

This is not a good defense. When the Holpuch Company's right to proceed was terminated, the surety company, by agreement, was substituted for it as the prime contractor, subject to the obligations of the contract and entitled to all rights and benefits accruing under it. *Fidelity & Casualty Co.* v. *United States*, 81 C. Cls. 495. If excess costs were incurred, they were incurred by plaintiff, so far as the defendant is concerned. This is clearly true in a case where the surety employs another contractor to complete the work. That the same contractor was employed would seem to make no difference.

It may be that the surety undertook to require the Holpuch Company to bear these excess costs, but whether or not it did or whether or not it succeeded, the record does not show. But even if it did, this does not relieve the defendant from liability. Defendant has not paid whatever debt it owes. Its obligation has not been discharged. Whatever may have been paid by the Holpuch Company was not paid for the account of the United States.

The first item of plaintiff's claim is for the cost of changing certain barrel bolts on window screens. On final inspection by the Government's officers plaintiff was required to change them in order to make a more workmanlike job. Plaintiff did so, at a cost of $387.20. We do not need to decide, however, whether or not plaintiff's superintendent of construction was justified in requiring the change, because plaintiff made the change without protesting to the contracting officer against being required to do so. Article 6 of the contract gave the Government "the right to reject

defective material and workmanship or require its correction." If plaintiff thought the job was not defective, it was required by article 15 of the contract to present the matter to the contracting officer for his decision. This article provides:

> * * * all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned. * * *

Plaintiff did not present the matter to the contracting officer and, therefore, is not in position to complain of the requirement of the superintendent of construction.

Plaintiff's next claim is for the cost of installing access panels not required by the plans and specifications. Plaintiff was required by the superintendent of construction to install 61 panels which were not required by the plans and specifications. This was extra work required of plaintiff, but plaintiff cannot recover therefor, in view of article 5 of the contract, which provides:

> * * * no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

This work was not ordered in writing by the contracting officer. On the contrary, when the superintendent of construction advised the contracting officer that he had ordered the installation of these 61 extra panels the contracting officer ruled that they were not to be installed.

The purpose of article 5 is to protect the Government against the cost of extra work ordered by a subordinate, but not approved by the contracting officer. Had plaintiff waited to secure the ruling of the contracting officer the additional access panels would not have been installed, and plaintiff would not have incurred the additional expense.

Plaintiff's next claim is for $332.75 for membrane waterproofing. The superintendent of construction ruled that

this work was required by the plans and specifications. Plaintiff did the work without presenting the dispute to the contracting officer and, for these reasons stated above, cannot recover.

The next claim is for $3,993.00 for wood terrazzo grounds. These wood grounds were not called for in the specifications, but the superintendent of construction required plaintiff to use them because it was good practice to do so, and because they were necessary to do a workmanlike job.

Some justification for the ruling is to be found in section 24 C (19) of the specifications, under the general heading of "carpentry." This section reads:

> Wood grounds shall be provided where shown or required for plastering, for securing all wood trim or other finished woodwork and for securing the work of all trades. * * *

But the contractor protested to the contracting officer against this ruling of the superintendent of construction and asked for an order in writing on the ground that this was an extra. The contracting officer, however, ruled that the contract required the work to be done, but left to the plaintiff the settlement of the dispute as to which of its subcontractors would be required to do the work. This ruling of the contracting officer as to whether or not these wood grounds were required by the specifications, being a ruling on a question of fact, is final under article 15, *supra*, in the absence of appeal to the head of the department. No appeal was taken and plaintiff, therefore, is bound by the ruling.

Plaintiff's next claim is for the cost of repairing cracks in the plastering, in the amount of $497.23. Under the specifications the contractor was required to maintain in the building a minimum temperature of 40° F. while the plastering was going on. In order to obtain this temporary heat the contractor was permitted to connect the radiators for the buildings to the then existing heating system at the Veterans' Administration Home. It developed, however, that this heating plant was not sufficient to maintain heat in the Veterans' Home and also in the buildings under con-

struction, and while the plastering was being done the defendant shut off the heat in the buildings under construction. As a result the wet plaster froze, causing it to disintegrate. Plaintiff was required to replace it or repair it, which it did, at a cost of $452.03. It presented claim to the contracting officer, but its claim was denied because the contracting officer said, "there is no provision under your contract for the payment of an item of the nature."

The damage to the plastering was clearly the fault of the defendant in failing to furnish the temporary heat which it had agreed to furnish and plaintiff is entitled to recover the damage resulting therefrom.

Plaintiff's claim is in the amount of $497.23, but this includes $41.09 for overhead, and $45.20 for profit. It is entitled to recover only the damage actually suffered, which was the actual cost of repairing or replacing the plaster; it is not entitled to recover profit. Plaintiff is entitled to recover $452.03.

Plaintiff also claims $738.30 for brushing plaster made necessary by the failure of defendant to furnish the necessary heat. Plaintiff is entitled to recover this amount, less the amount included therein for profit, which is $67.11. Plaintiff is entitled to recover on this item the sum of $671.19.

Plaintiff's next claim is in the amount of $13,403.97 for extra furring. The specifications provide that all pipes, ducts, etc., for plumbing and heating work, except in unfinished rooms, should be enclosed by masonry or furring, unless indicated otherwise. It was found, however, that a great many horizontal and vertical pipes had to be run in places not shown by the drawings, due to discrepancies between the mechanical and architectural drawings, of which there were about 500. The location of the pipes was determined by the defendant's superintendent of construction as the work progressed. This required the contractor to do a great deal of furring not called for by the drawings. This was done by plaintiff at the direction of defendant's superintendent of construction. It was an extra made necessary by defendant's defective drawings, but plaintiff is barred from recovery therefor by article 5 of the contract,

quoted above. Before doing this extra work plaintiff was required by the contract to obtain an order in writing. This it did not do.

Plaintiff's next claim is for adjusting windows, $613.77. In fitting the window sash into their frames plaintiff allowed the customary clearance in order that the sash might be moved freely up and down. Thereafter, on account of the moist conditions in the buildings due to plastering, the sash swelled and because too tight for operation. Defendant's superintendent required plaintiff, over its protest, to plane the window sash. After the plastering had dried the windows rattled and defendant's officers required plaintiff to tack maple strips to the windows to bring them back to their proper width. The cost of doing this was $613.77, including overhead and profit. This was extra work made necessary by the fault of the defendant's superintendent of construction in ordering plaintiff to plane the windows in the first place. However, plaintiff is not entitled to recover therefor on account of its failure to secure from the contracting officer an order in writing for this extra work.

Plaintiff's last claim is for damages for delays caused by failure to do promptly the plumbing, heating, electrical work, etc. The P. H. Meyer Company, of Louisville, had an independent contract with defendant for the doing of this work, but its right to proceed under its contract was cancelled on March 31, 1933, and thereafter this work was performed by the defendant itself.

It is admitted the Meyer Company did delay plaintiff, but plaintiff cannot recover from this defendant therefor. It is clearly not entitled to recover from the defendant damages for delays caused by an independent contractor, and not involving any fault on the part of defendant. It was not the defendant that caused these delays; they were caused by a third party.

But the findings of fact of the Director of Construction of the Veterans' Administration, approved by the Assistant Administrator of the Veterans' Administration, show that after the defendant took over this work from the P. H. Meyer Company there was still some delay on the job. For

such delay plaintiff is entitled to recover; but the proof does not show the amount of the delay nor the damages caused thereby. Plaintiff undertook to show its damage for the entire delay caused by the doing of the plumbing, electrical, etc., work, both the delay caused by Meyer Company and the delay caused by the defendant, but it does not separate the two. For failure of proof, no recovery can be allowed on this item.

It results that plaintiff is entitled to recover on the whole case the sum of $1,123.22. Judgment for this amount will be entered. It is so ordered.

MADDEN, *Judge;* and LITTLETON, *Judge,* concur.

WHALEY, *Chief Justice,* dissents.

JONES, *Judge,* took no part in the decision of this case.

A true copy.

Test:

—— ——, Clerk, Court of Claims of the United States.

(7729)

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646107—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1123

STANDARD ACCIDENT INSURANCE COMPANY,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 47–52) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 8, 1945 (R. 53). The petition for a writ of certiorari was filed on April 7, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether the United States is liable for delay to one contractor caused by another contractor on a Government project divided among several independent contractors by separate standard form construction contracts.

2. Whether, under a standard form construction contract, a contractor may recover compensation in addition to the contract consideration, when the contractor has entirely disregarded the administrative procedure outlined in the contract with regard to the extra work on which the claim is based.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract involved are set out in the Appendix, *infra*, pp 13–16.

STATEMENT

On December 30, 1931, the Joseph A. Holpuch Company entered into a general contract (No. VAc 110) with the United States for the construction, for a consideration of $788,600.00, of a Veterans' Administration hospital building and nurses' quarters at Leavenworth, Kansas (Fdg. 2; R. 34).[1] The contract did not cover mechanical trades work such as plumbing, heating and certain other necessary matters in connection with the construction of the hospital (Fdg. 2; R. 34). On

[1] The contract was Standard Form No. 23, approved by the President on November 19, 1926 (R. 24).

January 8, 1932, petitioner became surety for the performance by the Holpuch Company (Fdg. 2; R. 34). Simultaneously with the Holpuch Company contract, the United States entered into a contract with the P. H. Meyer Company for certain portions of the mechanical trades work mentioned above and not covered by the general construction contract (Fdg. 18; R. 45).

Under the Holpuch contract, construction was to commence within 15 calendar days after notice to proceed and was to be completed within 300 calendar days thereafter (Fdg. 2; R. 34). The Meyer contract provided that work should "be commenced promptly after date of receipt of notice to proceed' and "be completed at a date not later than that provided in the contract for General Construction" (Fdg. 18; R. 45).

Notice to proceed was received by the Holpuch Company on January 18, 1932, and work was begun on February 2, 1932 (Fdg. 2; R. 35). In accordance with the terms of the contract, the work was to be completed by November 13, 1932 (Fdg. 2; R. 35). On April 1, 1932, the Holpuch Company's right to proceed with the work was terminated by the contracting officer under Article 9 of the contract, on the ground that the Company was not proceeding with sufficient diligence to insure completion within the agreed time (Fdg. 4; R. 37).

The Holpuch Company took no appeal to the department head, as provided by Article 15 of its

contract, from the termination decision of the contracting officer.[2] Instead, pursuant to a conference held in Washington, D. C. between a representative of the Company, a representative of the petitioner and the Government's contracting officer, petitioner undertook to complete the work under the terms of the original contract (Fdg. 5; R. 37). Under the arrangement, petitioner appointed a general superintendent or manager for the project (Fdgs. 5, 9; R. 37, 39). Further, petitioner entered into a contract with the Holpuch Company whereby the Company agreed to perform work originally agreed to be performed, including changes past and future, but not including work already performed, all at the original contract price as amended, and petitioner agreed

[2] The Holpuch Company brought suit for damages in the Court of Claims against the United States, alleging that this termination constituted a breach of contract. *Joseph A. Holpuch Company* v. *United States*, Court of Claims, No. 43813. The Court of Claims dismissed the petition on the same day that judgment was rendered in the instant case, holding that the suit was foreclosed by the Holpuch Company's failure to pursue the administrative appeal procedure set forth in Article 15 of its contract and that, instead of appealing the decision of the contracting officer, the Company had, in fact, acquiesced therein. No review by this Court is being sought in the *Holpuch* case. Accordingly, petitioner's attempt to characterize the termination order as improper by an oblique reference to the commissioner's finding, deemed irrelevant by the court below in the *Holpuch* case (Pet. 2, Br. 25), and its reference to an offer of data by the Holpuch Company to prove its ability to complete the work (Pet. 3), are entirely unsupported by the record herein.

to pay over the contract consideration to the Company (Fdg. 5; R. 37–38).

The construction was substantially completed by June 30, 1933 (Fdg. 6; R. 38). The full contract price was received by petitioner and turned over to the Holpuch Company (Fdg. 6; R. 38).[3] In connection with certification for final payment by the General Accounting Office, petitioner was relieved from payment of liquidated damages, theretofore assessed in accordance with the provisions of Article 9 of the contract, for 229 days' delay beyond the agreed contract time for completion of the work (Fdgs. 6, 19; R. 38, 46).

Petitioner protested the nonpayment of various claims indicated by a statement attached to its final voucher (Fdg. 19; R. 46). A number of the claims thus itemized became the subject matter of its suit in the Court of Claims. With the exception of an award of damages to petitioner for plaster repair and brushing necessitated by a temporary failure of steam heat required to be furnished by the Government under the contract (Fdgs. 13, 14; R. 42–43, 50–51), the Court of Claims denied recovery to petitioner after detailed consideration of the numerous items of the claim (Fdgs. 7–18; R. 38–46, 47–52).

[3] Pursuant to the arrangement under which petitioner performed the contract, $5,130 was paid by the Government directly to the Holpuch Company for work done prior to the termination order.

Petitioner urges only two of the claims made in the court below in the instant application for certiorari. The first of these is an item, stated in the complaint below to amount to $65,013.76,[4] which petitioner seeks to charge against the United States for an alleged 333 days'[5] delay caused to it in the performance of its contract (R. 16–20, 22–23). The lower court carefully examined this claim and found that petitioner had been delayed as a result of lack of diligence by the Meyer Company, the mechanical trades contractor mentioned above (Fdg. 18; R. 45). The Meyer Company contract was terminated by the Government on March 31, 1933, approximately three months before petitioner's completion of the entire construction job (Fdg. 18; R. 45). The Government itself completed the mechanical trades work with some resulting additional delay to petitioner (Fdg. 18; R. 45). However, the court found no showing by petitioner as to the amount of delay caused by the Meyer Company or the amount caused by the Government, and

[4] Petitioner refers in its instant application to an amount of $54,810.27 as the amount of delay damages "proven" by it (Pet. 5). The record contains no specific sum other than that alleged in the complaint, and the Court of Claims found no damage or delay period proven.

[5] Petitioner here claims 352 days as the delay period (Pet. 4), and refers to a ruling of the Veterans' Bureau. Neither claim nor reference has any basis in the record (Fdg. 18; R. 45–46, 52) and petitioner's statement that there is no dispute as to the extent of the delay (Br. 10) is footless.

further found that petitioner failed to show the damage resulting from the Meyer Company delay and from the Government's delay (Fdg. 18; R. 45–46). In its opinion, the court held petitioner not entitled to recover from the Government for delays caused by the Meyer Company, and further denied recovery in connection with any delay caused by the Government because of petitioner's failure of proof as to the amount of the delay or the damages caused thereby (R. 52).

The further claim made in the court below by petitioner, and also urged here, involves an item of $13,403.97 on account of "furring" not shown by the drawings (Fdg. 15; R. 43–44). The "furring" in question was done by petitioner at the direction of the Government's superintendent of construction (Fdg. 15; R. 44). This claim was denied by the lower court on the ground that petitioner had failed to comply with the requirement of Article 5 of the contract with regard to obtaining an appropriate order in writing from the contracting officer (R. 51).[6]

[6] In addition to delay damages and the "furring" claim, petitioner sets forth, in the instant application, a $13,809.73 wage claim, said to have been caused by failure of heat, delay caused by the Meyer Company and delay caused by the Government (Pet. 6–7). As petitioner states, this item was not discussed in the opinion below. Nor does it appear in the record. Petitioner describes this claim as dependent on its "main" argument in connection with delay damages (Br. 21). For this reason and because of its obscure basis, the claim will not be discussed in this brief.

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ARGUMENT

We submit that the questions which petitioner here seeks to raise were correctly decided by the Court of Claims in accordance with controlling decisions of this Court.

1. *Claim for delay damages.*—Petitioner, contending that the United States is liable to it for delay caused by the Meyer Company (Pet. 1, Br. 8), challenges the ruling of the court below that it was "* * * clearly not entitled to recover from the defendant [the United States] damages for delays caused by an independent contractor, and not involving any fault on the part of defendant. * * *" (R. 52.) In urging review by this Court, petitioner describes this ruling as the "bold" announcement of a new rule of law, unsupported by logic and contrary to all reported decisions.[7]

It is well established by decisions of this Court, under similar or identical contracts, that the Government neither expressly nor impliedly guarantees a contractor against delays caused by other contractors engaged in performing portions of a

[7] Petitioner seeks to buttress its position in this respect by referring to a so-called admission in the Government's brief below (Br. 8, 9). But the sentence complained of was a mere recognition of the Government's liability where it has broken a contract by delay, not a concession that such a breach had occurred. Moreover, the statement, made in connection with a defense that petitioner suffered no damage by reason of its contract with the Holpuch Company (see R. 48), has no relevance to petitioner's instant assertion of governmental liability.

single Government project. *Crook Co.* v. *United States,* 270 U. S. 4; *United States* v. *Rice,* 317 U. S. 61; cf. *United States* v. *Blair,* 321 U. S. 730, 731–734.[8] Governmental liability was denied in the *Crook* and *Rice* cases where the delay resulted from the exercise of the Government's power to issue change orders.[9] Petitioner's claim of Government liability herein, for delay caused by the Meyer Company, appears *a fortiori* governed by such decisions. Thus, far from constituting a "boldly announced" novelty, the challenged decision of the court below is squarely supported by, and compelled by, controlling decisions of this Court. Compare *United States* v. *Beuttas,* No. 431, this Term, decided April 23, 1945. Petitioner's contention to the contrary is without merit.[10]

Moreover, it should be noted that petitioner, in urging governmental liability for delay caused by the Meyer Company, has assumed that the necessary showing of delay period and damages attributable thereto was made in the court below. The fact is otherwise. A basic aspect of the rul-

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[8] In both the *Rice* case and the *Blair* case, the contract provisions were identical with those here involved.

[9] As in those cases, petitioner here was relieved from payment of liquidated damages for delay (Fdg. 19; R. 46).

[10] Petitioner refers to certain earlier decisions of the Court of Claims and of various state courts. These decisions were before this Court in the *Rice* case, (October Term 1942, No. 31, Pet. Br., p. 17, fn. 3; pp. 19–20, fn. 5), and obviously cannot be taken as reflecting the federal rule in the light of the decision in that case.

ing of the Court of Claims consists of its finding of fact (R. 45–46), that petitioner failed to sustain its burden of proving the periods of delay attributable to the Meyer Company or to the Government, or the consequent damages. This burden was clearly upon petitioner, *Ripley* v. *United States,* 223 U. S. 695, and, in the absence of record evidence to the contrary, the findings of the court below are conclusive. Cf. *United States* v. *Esnault-Pelterie,* 299 U. S. 201, 205–206.

2. *Claim for extra "furring".*—Petitioner's claim for "furring" expense was also properly rejected by the Court of Claims. Its decision was rested on petitioner's noncompliance with the express requirement of Article 5 (Appendix *infra,* p. 14), that a proper order in writing be obtained from the contracting officer for extra work.

We submit that the decision below was clearly correct and is fully supported by decisions of this Court. *United States* v. *Blair,* 321 U. S. 730; *Plumley* v. *United States,* 226 U. S. 545; cf. *United States* v. *Callahan Walker Co.,* 317 U. S. 56; *United States* v. *John McShain, Inc.,* 308 U. S. 512; *Hawkins* v. *United States,* 96 U. S. 689, 697.[11] The wisdom of requiring strict com-

[11] Though the court below considered the furring as extra work barred by petitioner's want of compliance with Article 5 (R. 51), additional bases for denial of the claim exist. With regard to furring not shown on the drawings, the contract specifications required all pipes to be covered, furred in, and plastered (Fdg. 15; R. 43–44). This general require-

pliance with the administrative procedure contained in standard Government contracts has been recognized by this Court. Only by such compliance can the Government be accorded an "opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers." *United States* v. *Blair, supra,* p. 735.[12] Here the court below has found that petitioner failed to comply with the contract provisions both as to orders in writing under Articles 3 and 5 and submission of disputes and appeal under Article 15 (Fdg. 20; R. 47). The record is barren of any showing that compliance with the requirements of the contract was impossible or futile. Petitioner's naked allegation that cost could not be determined in advance (Pet. 6), even if established, furnishes no justification for noncompliance with contract procedure. Nor can the

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ment appears to bring all "furring" work within the terms of the contract. Further, with regard to the furring of pipes whose location was changed by reason of discrepancies in drawings, Article 2 of the contract (Appendix, *infra*, p. 13) requires drawing discrepancies to be submitted to the contracting officer without whose decision such discrepancies shall not be adjusted save at the contractor's own risk and expense. Petitioner did not comply with this contract requirement (Fdg. 15; R. 44).

[12] Petitioner's claim in the court below furnishes a specific illustration. In connection with a claim for the cost of installation of access panels, installed by petitioner without regard to contract procedure, the Government's officers ruled that such panels should not have been installed when the matter finally came to their attention (Fdg. 9; R. 39).

contention that the changes were unanticipated (Pet. 6) help petitioner, since Articles 3 and 5 are designed to cover unanticipated work. *United States* v. *Rice, supra,* p. 68. Conduct such as petitioner's cannot be allowed to deprive the Government "* * * of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims * * *." *United States* v. *Blair, supra,* p. 735; cf. *United States* v. *Callahan Walker, supra,* p. 61.

CONCLUSION

The decision below presents no new question of importance and there is no conflict. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1945.

APPENDIX

CONTRACT

(R. 24–32)

ARTICLE 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figured dimensions or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes

cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

* * * * *

ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

* * * * *

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been

delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided,* That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further,* That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall

ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

* * * * *

ARTICLE 13.—*Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

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ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

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